INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statement	2
Argument:	
Introduction and summary	5
I. Under federal law, a patent of littoral property conveys to an ambulatory seaward boundary and hence vests a right to future accretions	7
II. Neither the establishment of Washington as a State nor the State's acquisition of title to the tidelands altered the nature of the boundary of federally patented littoral lands	12
III. The decision below authorizes an impermissible taking of property	16
Conclusion	22

CITATIONS

Cases:

Barney v. *Keokuk*, 94 U.S. 324 ..... 14, 21

Borax, Ltd. v. *Los Angeles*, 296 U.S. 10 ..... 3, 4, 7, 12, 13, 14

Borough of Ford City v. *United States*, 345 F. 2d 645, certiorari denied, 382 U.S. 902 4

Brewer-Elliott Oil Co. v. *United States*, 260 U.S. 77 ..... 15, 19, 20

County of St. Clair v. *Lovingston*, 23 Wall. 46 ..... 5, 8, 18

Eisenbach v. *Hatfield*, 2 Wash. 236 18

269-652—67——1

Cases—Continued

	Page
Ghione v. *State*, 26 Wash. 2d 635, 175 P. 2d 955 (1946)	11, 17
Jeems Bayou Club v. *United States*, 260 U.S. 561	9
Jefferis v. *East Omaha Land Co.*, 134 U.S. 178	9
Jones v. *Johnston*, 18 How. 150	8, 10
Joy v. *City of St. Louis*, 122 Fed. 524, affirmed, 201 U.S. 332	14
Ker v. *Couden*, 223 U.S. 268	14
The King v. *Lord Yarborough*, 2 Bligh N.S. 147, 4 Eng. Rep. 1087 (H.L. 1828)	8
United States v. *Louisiana*, No. 9, Orig., this Term	21
Madison v. *Basart*, 59 I.D. 415	9
Martin v. *Waddell*, 16 Pet. 367	15
Packer v. *Bird*, 137 U.S. 661	14, 21
Pollard v. *Hagan*, 3 How. 212	6, 14, 19
Port of Seattle v. *Oregon & W. R.R.*, 255 U.S. 56	10
Railroad Co. v. *Schurmeir*, 7 Wall. 272	9
St. Louis v. *Rutz*, 138 U.S. 226	14
Scratton v. *Brown*, 4 Barn. & C. 485, 107 Eng. Rep. 1140 (K.B. 1825)	8
Security Land & Exploration Co. v. *Burns*, 193 U.S. 167	9
Shively v. *Bowlby*, 152 U.S. 1	5, 11, 15, 21
Stevens v. *Arnold*, 262 U.S. 266	11, 14, 19
Stricker, R. M., 50 I.D. 357	9
United States v. *Grand River Dam Authority*, 363 U.S. 229	5
United States v. *Lane*, 260 U.S. 662	9
United States v. *Louisiana*, 363 U.S. 1	21
United States v. *Mission Rock*, 189 U.S. 391	10
United States v. *Oregon*, 295 U.S. 1	6, 15, 20, 21

Cases—Continued

	Page
United States v. *Smoot Sand & Gravel Corp.*, 248 F. 2d 822	10
United States v. *Texas*, 339 U.S. 707	15, 16
United States v. *Turner*, 175 F. 2d 644, certiorari denied, 338 U.S. 851	10
United States v. *Washington*, 294 F. 2d 830	13
Constitution and Statutes:	
Submerged Lands Act:	
Section 2(a)(2), 43 U.S.C. 1301(a)(2)	15
Section 3(a), 43 U.S.C. 1311(a)	15
Washington Constitution (1889): Article 17	16
Washington Laws, 1897, c. 89, §51, as amended by Laws, 1899, c. 83, §1	11
Miscellaneous:	
3 Dyer, 326b, 73 Engl. Rep. 737	8
2 Blackstone, *Commentaries*, 261	8, 9
2 Bracton, *Laws and Customs of England* (1569), c. 2 (vol. 1, p. 69, Twiss ed. 1878)	8
Corker, *Where Does the Beach Begin, and to What Extent Is This a Federal Question*, 42 Wash. L. Rev. 33 (1966)	17
Gould, *Law of Waters* (3d ed. 1900), §§155–157	8
2 Roll. Abr. 170 (1668)	8

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 15

STELLA HUGHES, PETITIONER

v.

STATE OF WASHINGTON

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The opinion of the Superior Court of the State of Washington, Pacific County, (R. 16–22) is unreported. The majority and dissenting opinions of the Supreme Court of the State of Washington (R. 22–48) are reported at 67 Wn. 2d 799, 410 P. 2d 20.

JURISDICTION

The judgment of the Washington Supreme Court was entered on January 20, 1966. A petition for rehearing was denied on April 14, 1966 (R. 63). The petition for a writ of certiorari was filed on July 12, 1966, and was granted on January 9, 1967 (R. 65; 385 U.S. 1000). The jurisdiction of this Court rests on 28 U.S.C. 1257(3).

QUESTION PRESENTED

Whether a State may alter the ambulatory boundary between its tidelands and uplands patented by the United States prior to statehood by declaring that boundary to be permanently fixed at the line of "ordinary high tide" on the date of admission to statehood, thereby depriving the upland owner of gradual, natural accretions occurring since that date.

STATEMENT

Petitioner is the owner of littoral land on the coast of Washington, under a patent issued by the United States before admission of Washington to the Union as a State. R. 7, 23.[1] The United States surveyed the land and meandered the coast line in 1859; since then the shore line has extended westward by gradual, natural accretion, both before and after admission of

[1] Records of the Bureau of Land Management, not included in the record in this case, disclose that the original federal patent on which petitioner relies (R. 2) was issued to Edwin G. Loomis July 2, 1866. The patent described the lands as—"* * * the Lots numbered three and four of Section Four in Township Eleven, North, of Range Eleven, West, in the District of lands subject to sale at Vancouver, Washington Territory containing fifty nine acres and fifty hundredths of an acre according to the official plat of the Survey of the said Lands, returned to the General Land Office by the SURVEYOR GENERAL * * *."

The plat of the survey shows the lots as bounded on the west by the shore of the Pacific Ocean, represented by a slightly irregular but substantially straight line running almost due north and south. The field notes of the survey indicate that the surveyor ran the section lines westward to "a bank 6 or 8 feet high," and meandered the shore line by a series of straight lines connecting those intersection points.

Washington to statehood in 1889. R. 8, 23. Petitioner sued the State to quiet her title to the area bounded by the "line of ordinary high tide" (R. 2–3). The State answered, conceding petitioner's title to all accretions formed before Washington's admission to the Union on November 11, 1889, but asserting title to all subsequent accretions. Specifically, the State alleged that the dividing line "is the line of ordinary high tide as it existed on that date, [which] is the line which the water impressed upon the soil by covering it for sufficient periods to deprive the soil of vegetation as of that date" (R. 4–5).

The trial court sustained the petitioner's title to the area landward of the mean high water line, defined as the line where the shore as it exists at any particular time is intersected by the average elevation of all high tides as observed through a complete tidal cycle of 18.6 years. R. 7–10. The Supreme Court of Washington reversed, holding that the issue was controlled by State law, which had frozen the boundary as of the date of Washington's admission to the Union, November 11, 1889. R. 22–42.[2] Two justices dissented. R. 42–48.

Following the filing of the petition for a writ of certiorari, this Court invited the Solicitor General to file a brief expressing the views of the United States

[2] While clearly holding that the boundary between tidelands and uplands is permanently fixed as of November 11, 1889, the opinion below is perhaps less clear in indicating which line the boundary follows—*i.e.*, whether it is the 1889 line of vegetation suggested by respondent or the 1889 line of mean high tide recognized by federal law (see *Borax, Ltd.* v. *Los Angeles*, 296 U.S. 10, 27) and adopted by the trial court (R. 7–8). Con-

(385 U.S. 807). In response to that invitation we filed a memorandum in November 1966 pointing out that the decision below divests federal patentees of property rights conveyed by the United States in the past, curtails the nature of the title to realty that the United States may convey in the future, and conflicts with numerous decisions of this Court; we urged that certiorari be granted.[3]

---

trary to respondent (Br. in Opp. p. 9), we read the decision below as accepting the trial court's high tide line, rejecting only the trial court's conclusion that the boundary line remained ambulatory after November 11, 1889. Thus the majority opinion (R. 35) first defines the phrase "ordinary high tide" as "the average of all high tides during the tidal cycle"—a definition identical to that given "mean high tide" in *Borax*, *supra*—and then concludes (R. 41–42) that "[t]he property line is the line of ordinary high tide, which we equate to *mean high tide*" on November 11, 1889 (emphasis added). Moreover, the adoption of a line-of-vegetation rule would unmistakably involve a taking of the land lying between the vegetation line and the mean high tide line. While the record does not disclose the distance between those lines in 1889, they were 386 feet apart in 1963 (R. 26). Nothing in the decision below suggests that the court approved any such confiscation.

Since we understand the decision below as rejecting respondent's line-of-vegetation contention, we confine our discussion in this brief to the accretion question. We note, however, that if we are correct in believing that the boundary is determined by federal law, then the court below was clearly required to apply the mean high tide line as defined in *Borax*. The line-of-vegetation rule is properly applicable only to nontidal waters, where no absolute mean high-water level can be established. *E.g.*, *Borough of Ford City* v. *United States*, 345 F. 2d 645 (C.A. 3), certiorari denied, 382 U.S. 902.

[3] We also noted in our memorandum that, according to the records of the Department of the Interior, the public and acquired lands of the United States stretch along 215 miles of the Washington coast and include substantial tracts of land held in trust for Indians.

ARGUMENT

INTRODUCTION AND SUMMARY

This controversy is a boundary dispute between two grantees of the United States. In Washington, as in other Western States, "the Federal Government was the initial proprietor * * * and any claim by a State or by others must derive from the federal title." *United States* v. *Grand River Dam Authority,* 363 U.S. 229, 235; *Shively* v. *Bowlby,* 152 U.S. 1, 50–51. The State concedes (R. 6) and both courts below recognized (R. 7, 23) that petitioner's title originated in a federal patent issued before Washington was admitted to statehood. It can hardly be doubted that the nature and extent of the title conveyed by that patent was, in the first instance at least, determined by federal law. We show in Point I (*infra,* pp. 7–11) that, under a long line of decisions of this Court, the seaward boundary of federally patented littoral land is deemed to be the line of mean high tide as continuously modified by the gradual, natural processes of accretion and erosion. Pursuant to this rule, which is derived from the English common law, the right to future accretions has been held "an inherent and essential attribute of the original property" and has been likened to the right "of the owner of a tree to its fruits," *County of St. Clair* v. *Lovingston,* 23 Wall. 46, 68–69. In light of this well settled rule, the State concedes (R. 23–24) that the right to accretions was enjoyed by petitioner's predecessors in title from the time the patent issued up to Washington's admission to the Union in 1889.

269-652—67——2

Upon admission to the Union, Washington received from the federal government title to the tidelands and to the beds of navigable rivers and lakes and other inland waters within the State. We show in Point II (*infra,* pp. 12–16) that the tidelands thus obtained by the State had an ambulatory landward boundary that was identical with the seaward boundary of the littoral lands previously patented. Title to tidelands was transferred to the State by virtue of its constitutional right to stand on an equal footing with the original States as regards the attributes of sovereignty. Since the original States succeeded to the tidelands previously held by the English Crown, this Court has held that States subsequently admitted to the Union receive a like title to their tidelands. *Pollard* v. *Hagan,* 3 How. 212. The determination of which lands were thus transferred to Washington and which were retained by the federal government clearly could not be controlled by Washington law. *United States* v. *Oregon,* 295 U.S. 1. Rather, the common law rule governing the sovereign's title to tidelands, as absorbed by the original States and reaffirmed by this Court, has of necessity become the yardstick of the title obtained by Washington and all the other States admitted after the formation of the Union. That yardstick undeniably lays out an ambulatory boundary on the landward side of the State's tidelands.

We also show (*infra,* pp. 12–13) that the court below was mistaken in supposing that, upon the establishment of Washington as a State, State law superseded federal law as the law controlling petitioner's rights

under a federal patent. Even after statehood, "[t]the question * * * as to the limit of the land conveyed [by a federal patent], or the boundary between the upland and the tideland, is necessarily a federal question." *Borax, Ltd.* v. *Los Angeles,* 296 U.S. 10, 22.

Finally, we show in Point III (*infra,* pp. 16–22), that the right to future accretions as initially conveyed by federal patent, has not been effectively terminated by the State subsequent to Washington's statehood. While that right could unquestionably be terminated through the State's power of eminent domain, that power has not been invoked here. Rather, the State has proceeded on the mistaken premise that the right to accretions is a mere license in the littoral owner to utilize the tidelands which, like the right to wharf out, may be revoked at will by the tideland owner. That premise involves a misunderstanding of the right to accretions which, under federal law, is a consequence of a boundary defined in terms of the mean high tide line and, hence, entails no intrusion upon the tidelands. We therefore conclude that the decision below authorizes an impermissible taking of a vested right without compensation.

I. UNDER FEDERAL LAW, A PATENT OF LITTORAL PROPERTY CONVEYS TO AN AMBULATORY SEAWARD BOUNDARY AND HENCE VESTS A RIGHT TO FUTURE ACCRETIONS

Numerous decisions of this Court make it abundantly clear that a federal patentee of land adjacent to navigable waters, including littoral land on lakes or seashores, as well as riparian land on navigable rivers, holds "a vested right" to future accretions upon the

shore as "an inherent and essential attribute of the original property." *County of St. Clair* v. *Lovingston,* 23 Wall. 46, 68–69. This doctrine that gradual, natural accretions or erosions operate to shift the boundary between upland and tideland was derived from the common law of England where it was well-settled as applied to lands adjacent to tidal waters.[4] It was widely accepted in the thirteen original States[5] and has been consistently applied by this Court in delimiting the rights of federal patentees.

Thus, as early as 1855 the Court explained in *Jones* v. *Johnston,* 18 How. 150, 155, that alluvion deposited on the shore of Lake Michigan necessarily fell within the shifting boundary of the littoral property:

> If the call for the southern boundary, instead of being a lake, which is a shifting line, had been a permanent object, such as a street or wall, there could not be two opinions as to the location. And yet the water-line, though it may gradually and imperceptibly change, is just as fixed a boundary in the eye of the law as the former. * * *

The Court concluded (18 How. at 156): "Land gained from the sea either by alluvion or dereliction, if the same be by little and little, by small and imperceptible

---

[4] 2 Blackstone, *Commentaries*, 261; 2 Bracton, *Laws and Customs of England* (1569), c. 2 (vol. 1, p. 69, Twiss ed. 1878); 2 Roll. Abr. 170 (1668); 3 Dyer, 326 (b), 73 Engl. Rep. 737–738; *Scratton* v. *Brown*, 4 Barn. & C. 485, 107 Eng. Rep. 1140 (K.B. 1825); *The King* v. *Lord Yarborough*, 2 Bligh N.S. 147, 4 Eng. Rep. 1087 (H.L. 1828).

[5] See generally Gould, *Law of Waters* (3d ed. 1900) §§ 155–157, pp. 306–314.

degrees, belongs to the owner of the land adjoining. 2 Bl. Com. 261–2." And the same principle was applied in *Jefferis* v. *East Omaha Land Co.*, 134 U.S. 178, involving accretion to a lot surveyed and platted by a public land survey which showed the lot as bounded by the meander line[6] of the Missouri River. The Court there held that the land conveyed by the original patent and subsequent transfers, which—like the patent to petitioner's predecessor—designated the lot

[6] In surveying parlance, a meander line is an approximate representation of the edge of a body of water, it being understood that the actual water line is the true boundary. In *Railroad Company* v. *Schurmeir*, 7 Wall. 272, 286–287, and again in *Jefferis*, *supra*, 134 U.S. at 196, this Court observed:

"Meander lines are run in surveying fractional portions of the public lands bordering upon navigable rivers, not as boundaries of the tract, but for the purpose of defining the sinuosities of the banks of the stream, and as the means of ascertaining the quantity of the land in the fraction subject to sale, and which is to be paid for by the purchaser.

"In preparing the official plat from the field-notes, the meander-line is represented as the border-line of the stream, and shows, to a demonstration, that the water-course, and not the meander-line, as actually run on the land, is the boundary." See, also, *United States* v. *Lane*, 260 U.S. 662.

Solely in the interest of completeness, we also note that in some relatively rare circumstances a purported meander line may be held to establish a boundary line—for example, where through fraud or gross mistake, the line has been run where actually there was no corresponding water line (*Security Land & Exploration Co.* v. *Burns*, 193 U.S. 167, 181–182; *Jeems Bayou Club* v. *United States*, 260 U.S. 561, 564) or where there has been such extensive accretion or reliction between the time of the survey and the time of the patent that the meander line no longer represents a water line on the latter date (*Madison* v. *Basart*, 59 I.D. 415 (1947); *R. M. Stricker*, 50 I.D. 357 (1924)). Such situations are unusual, and we have no reason to believe that the present case is among them.

by its survey number, was bounded by the water line so that all accretions altering the water line were included as part of the lot and belonged to the successive transferees of the lot. The Court referred to *Jones* v. *Johnston,* 18 How. 150, *supra,* saying (134 U.S. at 196)—

> * * * that case holds that a water line, which is a shifting line and may gradually and imperceptibly change, is just as fixed a boundary in the eye of the law as a permanent object, such as a street or a wall; and it justifies the view announced by the Circuit Court in its opinion, that where a water line is the boundary of a given lot, that line, no matter how it shifts, remains the boundary, and a deed describing the lot by number or name conveys the land up to such shifting line exactly as it does up to a fixed side line.

To be sure, it has been recognized that the owner of the tidelands may deny the littoral owner any right to utilize—by constructing wharves or otherwise—the submerged lands while they remain below the ordinary high tide line (see *Port of Seattle* v. *Oregon & W. R.R.,* 255 U.S. 56, 64; *United States* v. *Smoot Sand & Gravel Corp.,* 248 F. 2d 822, 826 (C.A. 4)) and may prevent the occurrence of accretion by artificially filling in the tideland or building breakwaters or the like.[7]

[7] Artificial fill does not change the legal character of the lands filled. *United States* v. *Mission Rock Co.,* 189 U.S. 391; *United States* v. *Turner,* 175 F. 2d 644, 647 (C.A. 5), *certiorari denied,* 338 U.S. 851.

See *Stevens* v. *Arnold,* 262 U.S. 266, 269–270. But the basic rule remains that when and if accretions do occur they fall within the boundary of the littoral owner (see *Shively* v. *Bowlby,* 152 U.S. 1, 35).[8]

Against this background of federal common law, it cannot be doubted that the patent to petitioner's predecessor in title—issued prior to Washington's statehood—must be understood to have conveyed an ambulatory seaward boundary—*i.e.,* a boundary that would move westward as accretions caused the line of mean high tide to recede (or eastward as erosion occurred). Indeed, it is conceded (R. 23–24) that the right to accretions was enjoyed from the time the patent issued up to November 11, 1889, when Washington was admitted to the Union. We proceed to show that the establishment of the State's sovereignty in no way altered the applicable law.

---

[8] We speak here of cases like the present one, where the boundary between upland and tideland titles has been created and defined by federal law. If both titles were to become merged in a common ownership, the owner would of course be free to subdivide his property again along any sort of boundary he chose to describe. Analogously, Washington, as owner of tidelands and shorelands (the latter defined as the area between high- and low-water lines on non-tidal waters) and also of the submerged lands beyond them, has provided that its grants of tidelands or shorelands will not include subsequent accretions to the tidelands or shorelands—that is, areas that change from wholly submerged lands to tidelands or shorelands. Wash. Laws 1897, c. 89, § 51, as amended by Laws, 1899, c. 83, § 1 (now R.C.W. 79.01.492), explained in *Ghione* v. *State,* 26 Wash. 2d 635, 651, 175 P. 2d 955, 965, and quoted by the court below, R. 31.

II. NEITHER THE ESTABLISHMENT OF WASHINGTON AS A STATE NOR THE STATE'S ACQUISITION OF TITLE TO THE TIDELANDS ALTERED THE NATURE OF THE BOUNDARY OF FEDERALLY PATENTED LITTORAL LANDS

Upon admission to the Union the State of Washington became the owner of the tidelands within its boundaries. But neither the establishment of State sovereignty nor the State's acquisition of title to the tidelands affected the boundary between the tidelands and federally owned or patented uplands.

We note first that the establishment of a State government in Washington did not affect the principle that the rights conveyed by a federal patent are determined by federal law. That proposition was spelled out with clarity in *Borax, Ltd.* v. *Los Angeles,* 296 U.S. 10. The Court there held that the boundary between a grantee of the State's tideland and a post-statehood federal patentee of the adjacent littoral land was the line of mean high tide in accordance with federal law. In concluding that the issue was controlled by federal rather than State law, the Court said (296 U.S. at 22):

> Petitioners claim under a federal patent which, according to the plat, purported to convey land bordering on the Pacific Ocean. There is no question that the United States was free to convey the upland, and the patent affords no ground for holding that it did not convey all the title that the United States had in the premises. The question as to the extent of this federal grant, that is, as to the limit of the land conveyed, or the boundary between the upland and the tideland, is necessarily a federal question.

> It is a question which concerns the validity and effect of an act done by the United States; it involves the ascertainment of the essential basis of a right asserted under federal law. *Packer* v. *Bird,* 137 U.S. 661, 669, 670; *Brewer-Elliott Oil Co.* v. *United States,* 260 U.S. 77, 87; *United States* v. *Holt Bank,* 270 U.S. 49, 55, 56; *United States* v. *Utah,* 283 U.S. 64, 75. Rights and interests in the tideland, which is subject to the sovereignty of the State, are matters of local law. *Barney* v. *Keokuk,* 94 U.S. 324, 338; *Shively* v. *Bowlby, supra,* p. 40; *Hardin* v. *Jordan,* 140 U.S. 371, 382; *Port of Seattle* v. *Oregon & Washington R. Co.,* 255 U.S. 56, 63.

The decision in *Borax* was held to be dispositive in *United States* v. *Washington,* 294 F. 2d 830 (C.A. 9), certiorari denied, 369 U.S. 817, which presented the very issue to be decided here. The United States, holding legal title to littoral land subject to a trust patent to an Indian, sued the State to establish title to accretions. The Court of Appeals for the Ninth Circuit held that under *Borax* "the question of whether imperceptible accretions go with the upland [must] be determined in accordance with federal law when title to the uplands is in or derived from the federal government" (294 F. 2d at 833–834). Accordingly, the court rejected the State's contention that, under State law, the boundary between upland and tideland was frozen as of 1889.

In sum, the fact of Washington's sovereignty does not in itself alter the controlling significance of federal law in construing a federal patent. There is, therefore, no validity in the view expressed by the

court below that "the rules applied" by the federal courts "do not override the established rules of property of the sovereign state in a controversy between it and one of its citizens" (R. 41). Nor does the State's proprietary title to its tidelands—acquired upon admission to the Union—in any way alter the nature of the seaward boundary of petitioner's littoral land. Washington's title to its tidelands and the beds of its inland navigable waters—like petitioner's title to her uplands—is derived from the federal government and is measured by federal law. While petitioner traces her title to a specific grant, the State's title derives from the constitutional imperative of the equal-footing doctrine as construed by this Court in *Pollard* v. *Hogan*, 3 How. 212.[9] The Court there held that, inasmuch as the original States had, as an attribute of their sovereignty, acquired title to tidelands previously held by the British Crown,[10] States subsequently created out of federal territories receive

[9] Those decisions of this Court holding that the location of littoral or riparian boundaries did not present a federal question have involved situations where the boundary was created by one of the original States or a prior sovereign, *Joy* v. *City of St. Louis*, 122 Fed. 524 (C.C. E.D. Mo.), affirmed, 201 U.S. 332; *Ker* v. *Couden*, 223 U.S. 268; see *Stevens* v. *Arnold*, 262 U.S. 266, 270; *Borax, Ltd.* v. *Los Angeles*, 296 U.S. 10, 15–16; or where new land resulted from a sudden or artificial deposit and so belonged to the State under federal law unless the State chose to relinquish it, *Barney* v. *Keokuk*, 94 U.S. 324, 337; *St. Louis* v. *Rutz*, 138 U.S. 226, 251; or where the question was whether State law had augmented the littoral or riparian owner's federal grant by relinquishing some State right in lands below the high-water line, *Packer* v. *Bird*, 137 U.S. 661, 669.

[10] See *Martin* v. *Waddell*, 16 Pet. 367, 410, 418.

a like title by virtue of the principle that all States must stand on an equal footing as regards the attributes of sovereignty.[11] By way of contrast, title to the very extensive federally owned uplands in the western territories was not automatically transferred to the newly created States since title to such property has not been deemed an attribute of sovereignty. See *United States* v. *Texas,* 339 U.S. 707, 716.[12]

The question of which lands are and which lands are not transferred from federal ownership to the newly created States is necessarily a federal question. "The laws of the United States alone control the disposition of title to its lands." *United States* v. *Oregon,* 295 U.S. 1, 27–28; *Brewer-Elliott Oil Co.* v. *United States,* 260 U.S. 77, 87–89. Accordingly, the extent of the tidelands received by Washington in 1889 is determined by federal rather than State law. Since, as we have shown above (*supra,* pp. 7–11), federal law establishes a boundary between tidelands and uplands in terms of the line of mean high tide, the landward boundary of Washington's tidelands, like the seaward boundary of petitioner's uplands,

[11] In *Shively* v. *Bowlby,* 152 U.S. 1, 27–28, the Court rejected the contention that the *Pollard* decision rested simply on the express "equal footing" requirement of the deed of cession by which Georgia had conveyed the Alabama territory to the United States for the creation of future states.

[12] This distinction between tidelands and uplands is preserved in the Submerged Lands Act. So far as the Act bears on tidelands, Congress merely confirmed each State's title to submerged lands "up to but not above the line of mean high tide" (Sections 2(a)(2) and 3(a), 43 U.S.C. 1301(a)(2) and 1311(a)).

is an ambulatory boundary reflecting the continuous natural processes of accretion and erosion. Indeed, since Washington received its title by virtue of its constitutional right to stand on an equal footing with the original States, the fact that those States, in succeeding to the title of the English Crown, received an ambulatory boundary to their tidelands demonstrates that Washington could receive no more. *United States* v. *Texas*, 339 U.S. 707, 717.

III. THE DECISION BELOW AUTHORIZES AN IMPERMISSIBLE TAKING OF PROPERTY

We have just shown that the ambulatory boundary, *i.e.*, the right to accretions, conveyed by a federal patent was not affected by Washington's admission to the Union. The remaining question, therefore, is whether the State could effectively terminate that right.

If we understand it correctly, the court below found the source of a supervening State rule of law in Article 17 of the State constitution, adopted in October, 1889. That article provides:

> §.1 DECLARATION OF STATE OWNERSHIP. The state of Washington asserts its ownership to the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide, in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes: Provided, that this section shall not be construed so as to debar any person from asserting his claim to vested rights in the courts of the state.

> § 2 DISCLAIMER OF CERTAIN LANDS. The state of Washington disclaims all title in and claim to all tide, swamp and overflowed lands, patented by the United States: Provided, the same is not impeached for fraud.

This "constitutional assertion of state ownership," the court found, "is clear and unambiguous" (R. 38).[18] The court concluded that "[t]he state's constitutional assertion of ownership in 1889 terminated any rights the upland owner may have had to future accretion. Thereafter, the possible rights of an upland owner are those that might be established by the legislature" (R. 40). This seeming confiscation is not explained as an exercise of the State's police power, as protective of any public interest, nor by invocation of eminent domain. Rather, it is explained merely in terms of the State's power to remake the law of real property.

Apparently recognizing that a State cannot, merely by asserting its sovereign power to make law, confiscate outstanding property rights, the court pro-

[18] This asserted lack of ambiguity is somewhat belied by the court's conclusion that the same constitutional provision that created an immoveable boundary on tidewater created an ambulatory one on nontidal waters. See R. 40–41, approving and distinguishing *Ghione* v. *State*, 26 Wash. 2d 635, 175 P. 2d 955 (1946). The subsequent enactments of the Washington legislature cited by the court (R. 30–33) do not point in the direction of the court's conclusion, and the court does not suggest that they operated retroactively to divest upland owners of post-1889 accretions. Were the issue open here, we would urge that the constitutional and statutory provisions relied on by the court cannot conceivably sustain the conclusion it reached. See Corker, *Where Does the Beach Begin, and to What Extent is this a Federal Question*, 42 Wash. L. Rev. 33, 77–88 (1966).

ceeded on the thesis that littoral owners such as petitioner have no vested right to such future accretions as may occur. Thus the court quoted its prior decision in *Eisenbach* v. *Hatfield,* 2 Wash. 236, 250, 26 Pac. 539, 543, where it said in dictum (emphasis added):

> But we are unable to see how one can have a *present* vested right to that which does not exist and which may never have an existence.

From this premise the court apparently concluded that the State's assertion of a fixed boundary does not divest littoral owners of any protected right. The thesis is fallacious.

First, while accretion may or may not occur in the future, a federal patent to littoral land conveys a present right to a boundary at the mean high tide line.[14] Second, both vested and contingent future interests in property are commonplace; on the court's premise the property rights of remaindermen may be seized by any State without compensation merely because possession is prospective. Third, this Court has held that the right to future accretions is "a vested right" like "that of the owner of a tree to its fruits." *County of St. Clair* v. *Lovingston,* 23 Wall. 46, 68–69. Finally, the court fails to recognize the distinction between rights of littoral owners to utilize the State's tidelands, as by

[14] The *Eisenbach* case involved the States' right to deny to a littoral owner any rights, such as wharfage, in adjacent tidelands *while they were still submerged.* In that context, the court quite correctly observed that it was only concerned with "the power of the state to deal with its own property" (2 Wash. at 253, 26 Pac. at 544). Here, however, where the disputed land has emerged from the sea, whether the land is the State's "own property" is the very question to be decided.

wharfing out, and the right to alluvion emerging above the line of mean high tide and therefore not lying within the State's tidelands. As this Court observed in *Stevens* v. *Arnold,* 262 U.S. 266, 270, "by the common law the right of accretion is not like the permissive right to use land still under water, but is a right as against the State as well as its grantees [of tidelands], when as here the grantees have not filled in the land." In sum, the right to accretions is not a license to invade tidelands that the State may revoke at will; it is rather the consequence of a boundary defined in terms of the mean high tide line, and as such, entails no intrusion upon the tidelands.

This Court has in the past had occasion to strike down similar attempts by States to obtain property by modifying rights established under federal law. Thus, in *Brewer-Elliott Oil Co.* v. *United States,* 260 U.S. 77, where the United States, before Oklahoma statehood, granted to the Osage Indians a tract of land extending to the main channel of the Arkansas River, the State was not allowed, by adopting a loose definition of navigability, to claim the riverbed portion of the grant under the *Pollard* v. *Hagan* rule. The Court explained (260 U.S. at 87–88):

> As to such a grant, the judgment of the state court does not bind us, for the validity and effect of an act done by the United States is necessarily a federal question. The title of the Indians grows out of a federal grant when the Federal Government had complete sovereignty over the territory in question. Oklahoma when she came into the Union took sovereignty over

> the public lands in the condition of ownership as they were then, and, if the bed of a non-navigable stream had then become the property of the Osages, there was nothing in the admission of Oklahoma into a constitutional equality of power with other States which required or permitted a divesting of the title. It is not for a State by courts or legislature, in dealing with the general subject of beds of streams, to adopt a retroactive rule for determining navigability which would destroy a title already accrued under federal law and grant or would enlarge what actually passed to the State, at the time of her admission, under the constitutional rule of equality here invoked.

The Court also pointed out that even if the river had been navigable by federal standards, the United States would have had power to make such a grant of river-bed lands before statehood (260 U.S. at 83–84); and that even though the effect of federal grants is presumed to be determined by local rules, where no contrary intent appears, those rules cannot "impair the efficacy of the grant or the use and enjoyment of the property by the grantee" (260 U.S. at 88).

In *United States* v. *Oregon,* 295 U.S. 1, the Court considered an Oregon statute of 1921 declaring that all lakes meandered in the federal surveys were to be deemed navigable and that title to the land under them, not previously granted by the State, "is hereby declared to be in the State of Oregon, and the State of Oregon hereby asserts and declares its sovereignty over the same and its ownership thereof." 295 U.S. at 26. The State's contention, as stated by the Court, was

that "upon grant of the uplands by the United States, whether to the State or others, title to the adjacent lake beds vested in the State by operation of the statute." *Ibid.* The Court rejected that argument, holding (*id.* at 29):

> * * * The case is not one of the reasonable construction of grants of the United States, but the attempted forfeiture to the State by legislative fiat of lands which, so far as they have not passed to the individual upland proprietors, remain the property of the United States. Such action by the State can no more affect the title of the United States than can the similar legislative pronouncements that streams within a State are navigable which this Court has found to be non-navigable.

We do not question the State's right to acquire accreted property or to acquire the right to future accretions by eminent domain, making just compensation for the interest taken. Nor do we question the State's right to impose regulations on the use to which the property of federal patentees may be put, as by zoning. The State is certainly free to augment the rights of littoral owners by relinquishing some aspect of its own tideland title. See *Barney* v. *Keokuk,* 94 U.S. 324, 338; *Shively* v. *Bowlby,* 152 U.S. 1, 40–47; *Packer* v. *Bird,* 137 U.S. 661, 669.[15] Likewise the State, when it has acquired littoral property, is free to grant it to

[15] Similarly, the United States, in relinquishing to the States its title to the continental shelf, could establish whatever outer boundary it chose. See *United States* v. *Louisiana*, 363 U.S. 1, 20; and see the brief for the United States filed this Term in that case (No. 9, Original), at p. 15.

others under such terms as it chooses and thus may withhold from its grantees the right to future accretions (see n. 8, *supra*, p. 11). But none of these considerations are present here. We see no escape from the conclusion that this case involves an uncompensated and impermissible taking by the State of the property of its neighbors.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of Washington should be reversed and the judgment of the trial court affirmed.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.
EDWIN L. WEISL, JR.,
Assistant Attorney General.
ROBERT S. RIFKIND,
Assistant to the Solicitor General.
ROGER P. MARQUIS,
GEORGE S. SWARTH,
Attorneys.

AUGUST 1967.

U.S. GOVERNMENT PRINTING OFFICE 1967